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In the Supreme Court of the United States

OCTOBER TERM, 1982

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under the facts of this case, petitioners have standing to challenge the validity of the Secretary of Labor's occupational safety and health standards regulating fire protection in the workplace, pursuant to Section 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(f).

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150 ..... 3, 4, 6, 8

Baker v. *Carr*, 369 U.S. 186 4

Control Data Corp. v. *Baldrige*, 655 F.2d 283, cert. denied, 454 U.S. 881 9

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 ..... 6, 8

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 8

Industrial Union Department v. *American Petroleum Institute*, 448 U.S. 607 8

McGowan v. *Maryland*, 366 U.S. 420 6

Scanwell Laboratories, Inc. v. *Shaffer*, 424 F.2d 859 8

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 7

Sierra Club v. *Morton*, 405 U.S. 727 5

Page

Cases—Continued:

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 5

Singleton v. *Wulff*, 428 U.S. 106 6

Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 ..... 4, 6, 8

Warth v. *Seldin*, 422 U.S. 490 ..... 4, 6

Constitution, statutes and regulations:

United States Constitution, Article III 5

Administrative Procedure Act, 5 U.S.C. (& Supp. V) 551 *et seq.* 5, 6

5 U.S.C. 702 6

Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. IV) 651 *et seq.* 1, 3, 4, 5, 6, 7, 8, 9

Section 1(b), 29 U.S.C. 651(b) 1
Section 5(a), 29 U.S.C. 654(a) 7
Section 6(b), 29 U.S.C. 655(b) 7
Section 6(b)(1), 29 U.S.C. 655(b)(1) 7
Section 6(f), 29 U.S.C. 655(f) 2, 6, 7

29 C.F.R. 1910.157(b) 2

29 C.F.R. 1910.157(d) 2

Miscellaneous:

116 Cong. Rec. 37340 (1970) 7

36 Fed. Reg. 10601 *et seq.* (1971) 2

45 Fed. Reg. 60656 *et seq.* (1980) 2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 679 F.2d 679.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was entered on May 27, 1982. A petition for rehearing was denied on July 22, 1982 (Pet. App. 9a). The petition for a writ of certiorari was filed on October 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 ("the OSH Act"), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). To this end, in

May 1971, the Secretary of Labor promulgated occupational safety and health standards regulating fire protection in the workplace; employers were required to comply with these standards. See 36 Fed. Reg. 10601 *et seq.* (1971). On September 12, 1980, after extensive rulemaking proceedings, the Secretary amended the fire protection standards. See 45 Fed. Reg. 60656 *et seq.* (1980).

Pursuant to 29 U.S.C. 655(f), petitioner Fire Equipment Manufacturers' Association, Inc. ("FEMA"), a trade association representing manufacturers of fire-fighting equipment, and petitioner Elkhart Brass Manufacturing Co., Inc. ("Elkhart"), a manufacturer of such equipment and a member of FEMA, petitioned the court of appeals to review certain provisions of the amended standards (Pet. App. 1a-2a).[1] The particular standards petitioners challenged "permit an employer (1) to choose between two safety options (the deployment of portable fire extinguishers throughout the workplace or the institution of a written evacuation plan) [29 C.F.R. 1910.157(b)] and (2) to use ⅝ inch diameter booster hose in lieu of 1½ inch hose or fire extinguishers as part of the workplace's fire safety equipment [29 C.F.R. 1910.157(d)]" (Pet. App. 2a).[2] Petitioners alleged that the new regulations adversely affect them in four ways (*ibid.*): (1) the new regulations will result in reduced protection for employees in their workplaces; (2) as a manufacturer of fire extinguishers and 1½ inch hose,

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[1]Ansul Company, a third petitioner in the court of appeals, did not join in the petition for a writ of certiorari.

[2]Petitioners asserted that the Secretary failed to provide the public with adequate notice of his proposed amendments, that the revised standards are not appropriately protective, that the new standards differ impermissibly from national consensus standards relating to fire protection, and that the determination to issue the challenged standards is not supported by substantial evidence (Pet. App. 2a).

Elkhart will suffer lost profits; (3) as an association promoting workplace safety, FEMA's objectives have been impaired; and (4) as an employer, Elkhart will suffer a competitive disadvantage by choosing to provide more safety to its employees through the use of fire extinguishers and greater diameter hose.

2. The court of appeals dismissed petitioners' claims. As to the assertion that employees have suffered a loss of workplace protection, the court held that petitioners lack standing because "[t]his claim involves the interests of a third party" and the court did not consider petitioners "the most effective advocate of employee interests" (Pet. App. 3a).

The court further held that petitioners lack standing under *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), to raise the other interests asserted, because they are not arguably within the "zone of interests" protected or regulated by the OSH Act (Pet. App. 3a-7a). First, the court held that maintaining the level of manufacturers' profits is outside not only "the interests of employees in securing safe working conditions," but also the cognizable economic interests of employers in having to pay for compliance with OSHA requirements (*id.* at 4a-5a). Second, the court ruled that "[p]reserving the right of trade associations to promote their objectives is not an interest within the zone protected by the Act" and that FEMA's assertion of an "interest" in promoting workplace safety "is really a backhanded attempt to assert the interest of employees" (*id.* at 5a). Finally, the court concluded that Congress did not intend to protect against the competitive disadvantage to employers who provide more protection than the standards require (*id.* at 5a-7a). Because any relief from competition that might occur is "wholly incidental" to the purposes of the OSH Act, the court held that petitioners' last asserted interest also is outside the zone.

ARGUMENT

Both constitutional requirements and prudential considerations limit a party's standing to challenge administrative action in the courts. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) ("*Valley Forge*"). Article III of the Constitution requires a party to show that it was injured in fact by the action. See *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 151-152 (1970) ("*Data Processing*"). Quite apart from this, traditional rules of judicial self-restraint require that a party must generally "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties" (*Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)), and also that a party's claim must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing, supra*, 397 U.S. at 153. Because the court of appeals correctly applied these principles in holding that petitioners lack standing to challenge OSHA's revised fire protection standards, and because this case presents no novel application of these principles, review of the decision below is unwarranted.

1. Petitioners contend (Pet. 19-25) that the court below erred in evaluating their standing to raise two interests that they allege are adversely affected by the new standards and are within the "zone of interests" protected by the OSH Act — their interest in adequate protection for employees and FEMA's interest in promoting its organizational objectives. As to neither of these interests, however, do petitioners have the personal stake in the outcome of the controversy that Article III requires. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The only "injury-in-fact" that petitioners cite (Pet. 19), and the only one the court of appeals expressly recognized (Pet. App. 3a), is the harm to fire equipment manufacturers' profits that allegedly will result from employers'

compliance with the revised standards. However, the court below held that this interest is not within the "zone of interests" protected by the Act (*id.* at 4a-5a), and petitioners do not challenge that determination here. Accordingly, petitioners should not be permitted to rely on the loss of profits claim as a basis for asserting "injury-in-fact."

As to petitioners' remaining claims, the court of appeals correctly observed (Pet. App. 3a) that it is the safety of employees, not of fire equipment manufacturers or their trade association, that is at risk if the Secretary has promulgated standards that are not sufficiently protective. Moreover, as this Court's decisions make clear, FEMA's "interest" in the problem of fire safety cannot substitute for the concrete injury required by the Constitution. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39-40 (1976); *Sierra Club* v. *Morton*, 405 U.S. 727, 736-741 (1972).[3] Indeed, FEMA's attempt to assert its

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[3]In *Simon*, several individual indigents and organizations sued the Secretary of the Treasury and the Commissioner of Internal Revenue, asserting that the Internal Revenue Service had violated the Internal Revenue Code and the Administrative Procedure Act by issuing a revenue ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency room treatment to indigents. 426 U.S. at 28. The Court held that "the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing simply on the basis of that goal * * * [and that] [i]nsofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail." *Id.* at 39-40.

In *Sierra Club*, an organization, one of whose "principal purposes * * * is to protect and conserve the national resources of the Sierra Nevada Mountains" (405 U.S. at 735 n.8), sought a declaratory judgment and an injunction to restrain federal approval of an extensive recreational development in those mountains. *Id.* at 728-730. The Court held that the Sierra Club's "special interest" in the problem was not a sufficient injury in fact. *Id.* at 738-740. Otherwise, the Court noted, any group or individual citizen could allege a "special interest" and, in effect, bypass the Article III limitations. *Id.* at 739-740.

"organizational interest" was, in the court of appeals' words, "really a backhanded attempt to assert the interest of employees" (Pet. App. 5a). The association simply has no real personal stake in the controversy.

2. At all events, petitioners cannot surmount the prudential barriers to their standing.[4] First, petitioners' claim that the new safety standards result in a loss of workplace protection for employees "involves the interest of a third party" (Pet. App. 3a), which petitioners may not assert. *Warth* v. *Seldin, supra,* 422 U.S. at 499. Although there are exceptions to this general rule (see *Singleton* v. *Wulff,* 428 U.S. 106, 114-118 (1976) (plurality opinion)), none applies here, since there is no genuine obstacle to the employees' assertion of their own rights. See *id.* at 115-116 (plurality opinion); *McGowan* v. *Maryland,* 366 U.S. 420, 429-430 (1961). Any union or individual employee could have sought review pursuant to 29 U.S.C. 655(f) during the 60-day period prescribed for such review; the fact that none did so suggests that employees and their representatives may affirmatively have determined not to assert these rights. In these circumstances, as the court of appeals stated, petitioners are "[not] the most effective advocate of employee interests" (Pet. App. 3a). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 80 (1978).[5]

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[4]The Administrative Procedure Act, 5 U.S.C. 702, which permits any person "adversely affected" by agency action to seek judicial review, does not alter the basic rules of standing. See *Valley Forge, supra,* 454 U.S. at 487-488 n.24. In *Data Processing, supra,* the Court applied the "zone of interests" test in an APA review action. Since the OSH Act, like the "broadly remedial" APA (*Data Processing, supra,* 397 U.S. at 156), allows "adversely affected" persons to seek judicial review, there is, contrary to petitioners' assertion (Pet. 9 n.9), no reason to believe that the prudential rules are to be applied any differently in the context of the former statute.

[5]Petitioners argue (Pet. 21 n.21) that they "are the *only* advocates that can challenge the OSHA fire regulations" because judicial review under 29 U.S.C. 655(f) was not sought by any other party within 60 days

Second, the court of appeals correctly held that petitioner FEMA's interest in promoting its organizational objectives is outside the "zone of interests" protected or regulated by the OSH Act. The Act's stated purpose is to assure safe and healthful working conditions for every employee and to preserve human resources. 29 U.S.C. 655(b). It achieves that purpose by regulating the conduct of employers, requiring them to comply with OSHA standards and to provide a workplace free from recognized hazards. 29 U.S.C. 654(a). Nowhere does the statute "[p]reserv[e] the right of trade associations to promote their objectives" (Pet. App. 5a), even if those objectives happen to be consistent with the OSH Act's goals.

Petitioners argue (Pet. 23-25), however, that the judicial review authorization in 29 U.S.C. 655(f) is broad enough to encompass their "organizational objectives" interest. In support of this argument, they rely on legislative history indicating that Congress contemplated that trade associations would utilize the statute's "judicial review protection" (Pet. 23-24 n.23, quoting 116 Cong. Rec. 37340 (1970) (remarks of Sen. Williams)). But nothing in the legislative history suggests that trade associations may do anything more than represent their members in a proceeding for judicial review with respect to interests regulated by the OSH Act. Like the "giant corporations, * * * small employers and companies" (*ibid.*) that may judicially challenge OSHA standards with which they must comply, trade associations may challenge regulations that impose compliance

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following promulgation. But "[t]he assumption that if [a party] ha[s] no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). In any event, any dissatisfied union or employee may still petition the Secretary for modification of the current standards pursuant to 29 U.S.C. 655(b)(1). Thus, employees may still assert their rights under the OSH Act to safe and healthful working conditions.

obligations on their members. See, *e.g., Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607 (1980) (trade association petitioned on behalf of its members for review of OSHA's standards regulating occupational exposure to benzene).

Petitioners also contend (Pet. 12-18) that the "zone of interests" test is no longer the law, or that, at the least, it is inapplicable to review of government action that is arguably detrimental to the general health, safety, or welfare. Just last Term, however, this Court reaffirmed the test's vitality as a prudential limitation on standing without any hint that it should receive the limited application petitioners suggest. See *Valley Forge, supra,* 454 U.S. at 475. See also *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 n.6 (1979). In *Data Processing,* where the Court first articulated the "zone of interests" test, it recognized that standing may stem from "aesthetic, conservational, and recreational," as well as economic, injuries. 397 U.S. at 154. Thus, application of the test does not turn on abstract consideration of the *type* of interest asserted, but on whether that interest is within the range of interests that Congress sought to protect in the particular statute involved.

Moreover, careful reading of the cases on which petitioners rely undermines their claim that the courts have imposed a health, safety, or welfare limitation on the "zone of interests" test. Thus, the passage petitioners quote (Pet. 13) from *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra,* 438 U.S. at 79, does not mention the test because there the Court was discussing whether the plaintiff had satisfied the "case or controversy" requirement of Article III, not any prudential limitations on standing. Furthermore, as the District of Columbia Circuit has recently noted, *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970) (also cited by petitioners (Pet. 13-14)), was a pre-*Data Processing* case, and standing in that case turned

on the plaintiff's status as a "disappointed bidder" for a government contract, not on the fact that airport safety was involved. See *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 292-293 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). Petitioners' proposed limitation of the "zone of interests" test must accordingly be rejected.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners contend (Pet. 16-18) that review is necessary because lower courts have not applied the test in a consistent fashion. But none of the cases cited by petitioners construes the OSH Act; thus, this is a case of first impression. Moreover, petitioners have not shown that the interpretation of the "zone of interests" test adopted by any other circuit would be likely to produce a different result in this case.

DOJ-1982-12